

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARSHALL LITFIELD,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2007

No. 266237

Saginaw Circuit Court

LC No. 04-024782-FH

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of two counts of illegal use of a financial transaction device (credit card number), MCL 750.157q, and one count of conducting a criminal enterprise, MCL 750.159i(1). We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We decide this appeal without oral argument under MCR 7.214(E).

**I. FACTS**

Defendant was charged with two counts of illegal use of a financial transaction device (credit card number) and one count of conducting a criminal enterprise on an aiding and abetting basis. The prosecution's theory was that defendant assisted his nephew, Joseph Miller, in the commission of the offenses.

Veronica Bailey testified that in 2002, she was struggling financially, and that Joseph Miller, her former boyfriend, offered to pay her to obtain credit card numbers during the course of her employment as a night auditor at the Ramada Inn in Flint. Bailey testified that she provided credit card numbers belonging to hotel guests to Miller in return for cash and items such as a computer and tires. Bailey indicated that she believed that Miller intended to use the credit card numbers in an illegal fashion to purchase items to use or sell. Bailey stated that she knew that defendant was working with Miller to obtain credit card numbers.<sup>1</sup>

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<sup>1</sup> Bailey testified that she pleaded guilty to one count of illegally obtaining a financial transaction device in exchange for dismissal of other charges, a recommendation that she not serve any jail (continued...)

Joseph Miller testified that he obtained credit card numbers from Bailey in return for cash and items such as a computer and tires, and then used the numbers to purchase items over the telephone. Miller stated that he and other persons, including defendant, then went to the stores and picked up the items he had purchased.<sup>2</sup> Miller stated that he sold many of the items he purchased, and, pursuant to a prior arrangement, paid defendant 40% of the proceeds he obtained for the items. Miller stated that defendant knew that the items were purchased with stolen credit card numbers.

William Bolzman, a manager at a Maytag store, testified that on January 9, 2003, a man who identified himself as Ray Fischer purchased a gas range over the telephone, and said that the range would be picked up by Louis Peoples. Subsequently, two men came to the store and picked up the range. Bolzman identified defendant as the person who came to the store and gave his name as Peoples.

Aaron Joyce, an employee at a Lowe's store, testified that on January 8, 2003, a man who identified himself as Mike Waycaster purchased a water heater and carpeting over the telephone. Joyce identified defendant as one of two men who picked up the items.

Ray Fischer testified that he stayed at the Ramada Inn in Flint on December 31, 2002, and paid for the room with a credit card. Fischer stated that he did not give anyone permission to use his credit card to make purchases at either the Maytag or the Lowe's store.

Defendant testified that he had never been involved in a criminal enterprise with Miller. Defendant denied that he received credit card numbers from Miller or that he picked up items for Miller.

The trial court instructed the jury that to prove that defendant committed the offense of illegal use of a financial transaction device, the prosecution was required to establish that: Miller used Fischer's credit card, Miller did so knowingly, Miller did so without Fischer's consent, and Miller intended to defraud or cheat someone. The trial court instructed the jury that the offense was a specific intent crime. The trial court also instructed the jury on the elements of aiding and abetting. Defendant did not object to the instructions as given.

The jury convicted defendant of two counts of illegal use of a financial transaction device and one count of conducting a criminal enterprise.

The sentencing guidelines for the offense of illegal use of a financial transaction device, as scored by the trial court, recommended a minimum term range of zero to 11 months. The trial court scored Offense Variable (OV) 9, MCL 777.39, number of victims, at ten points for injury to two to nine victims. Defendant did not object to the scoring of the guidelines at sentencing. The trial court sentenced defendant to concurrent terms of 11 months to four years for illegal use of a financial transaction device, and to five to 20 years for conducting a criminal enterprise. Defendant received credit for 507 days served in jail.

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time, and her agreement to testify against defendant.

<sup>2</sup> Miller testified pursuant to a plea agreement similar to that obtained by Bailey.

## II. SENTENCING GUIDELINES

Defendant raises two issues on appeal. First, defendant argues that the trial court erred by scoring OV 9 at ten points for danger of injury to two to nine victims, because the only possible injury was financial in nature. We agree.

### A. Standard of Review

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied on in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *Kimble*, *supra*. If the issue is not preserved, review is for plain error. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).<sup>3</sup>

### B. Analysis

In *People v Melton*, 271 Mich App 590, 594-596; 722 NW2d 698 (2006), this Court held that a trial court may not score OV 9 for a financial injury. In the instant case, the guidelines as scored by the trial court recommended a minimum term range of zero to 11 months for defendant's convictions of illegal use of a financial transaction device, and 36 to 60 months for his conviction of conducting a criminal conspiracy. Had the trial court not scored OV 9 at ten points, the guidelines range for defendant's convictions of illegal use of a financial transaction device would have been zero to nine months, and the guidelines range for his conviction of conducting a criminal enterprise would have been 36 to 50 months. MCL 777.69; MCL 777.63. Thus, defendant's minimum sentences of 11 months for his convictions of illegal use of a financial transaction device and 60 months for conducting a criminal enterprise exceeded the properly scored guidelines. Defendant is entitled to be resentenced on all convictions. MCL 769.34(10).<sup>4</sup>

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<sup>3</sup> Defendant moved to remand this matter to the trial court to allow him to challenge the scoring of OV 9. In an order entered on July 26, 2006, this Court denied the motion on the ground that defendant "failed to properly support the motion with more than a conclusory statement entitled 'offer of proof.' MCR 7.211(C)(1)(a)(ii)."

<sup>4</sup> The properly scored guidelines range for defendant's convictions of illegal use of a financial transaction device is zero to nine months. Because the upper limit of this range is less than 18 months, the trial court on resentencing must impose an intermediate sanction or articulate substantial and compelling reasons for sentencing defendant to prison. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or 12 months,

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### III. JURY INSTRUCTIONS

Defendant also argues that when instructing the jury on the elements of the offense of illegal use of a financial transaction device, the trial court erred by failing to instruct the jury that Miller knew that Bailey had obtained Fischer's credit card number without Fischer's consent. Defendant contends that the instruction as given failed to convey the actual elements of the offense to the jury. We disagree.

#### A. Standard of Review

We review jury instructions in their entirety to determine if the trial court committed reversible error. Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *Id.*

#### B. Analysis

Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right must still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Leuth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In this case, after instructing the jury, the trial court inquired if the parties had any comments. Defense counsel stated that he was satisfied with the instructions as read. By expressly approving the instructions, defendant has waived the issue on appeal. *Id.*

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette

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whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, it must irresistibly attract the attention of the court, and it must exist only in exceptional cases. *People v Babcock*, 469 Mich 247, 256-257; 666 NW2d 231 (2003).